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Nos. 80-1684/1691

IN THE

Supreme Court of the United States

October Term, 1980

PEAT, MARWICK, MITCHELL & CO., *et al.*,

Petitioners,

v.

WACHOVIA BANK AND TRUST CO., N.A., *et al.*,

Respondents.

WHITE & CASE AND MARION JAY EPLEY, III,

Petitioners,

v.

WACHOVIA BANK AND TRUST CO., N.A., *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF OF AMERICAN INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS AS *AMICUS CURIAE* IN SUPPORT OF THE PETITIONS FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The American Institute of Certified Public Accountants confines its present participation to urging the Court to grant the Writ to review and decide at least the following issues which are subsumed by certain of the questions presented in the Petitions for Certiorari.

1. May a private cause of action for damages be implied under Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b) (1976) ("1934 Act") in favor of a purchaser of securities who is unable to satisfy the criteria for asserting the express causes of action provided by Section 18 of that Act?

2. May a private cause of action for damages be implied under Section 10(b) of the 1934 Act against a person who is alleged to be an aider and abettor of a violation of the Section?

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PRELIMINARY STATEMENT

The American Institute of Certified Public Accountants ("Institute") submits this brief as *amicus curiae* pursuant to Rule 36 of the Rules of this Court in support of the petitions of Peat, Marwick, Mitchell & Co., *et al.* ("PMM") in No. 80-1684 and White & Case, *et al.* in No. 1691 for a Writ of Certiorari and urges this Court to review and reverse the

decision of the Court of Appeals for the District of Columbia entered on December 5, 1980.[1]

QUESTIONS PRESENTED

The Institute confines its present participation to urging the Court to grant the Writ to review and decide at least the following issues which are subsumed by certain of the questions presented in the Petitions for Certiorari.[2]

> 1. May a private cause of action for damages be implied under Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b) (1976) ("1934 Act") in favor of a purchaser of securities who is unable to satisfy the criteria for asserting the express causes of action provided by Section 18 of that Act?
>
> 2. May a private cause of action for damages be implied under Section 10(b) of the 1934 Act against a person who is alleged to be an aider and abettor of a violation of the Section?

The Institute contends that these issues are each fairly presented upon an adequate record in this case. Each issue is of substantial significance to the interpretation and development of the law in the area and was wrongly decided by the Court of Appeals.

1. This brief is submitted upon consent of the parties pursuant to Rule 36.1 of this Court. The written consent of the Respondents in both cases, subject to a condition which has been fulfilled, is contained in a letter of counsel dated May 11, 1981; the consent of Petitioners in No. 80-1684 is contained in a letter of counsel dated May 11, 1981; and the consent of Petitioners in No. 80-1691 is contained in the letter of counsel dated May 14, 1981. True copies of such written consents are being filed simultaneously with this brief with the Clerk of the Court.

2. The Institute has not formulated and does not express any position with respect to the other issues set out in the questions presented in the Petitions for a Writ of Certiorari or upon other issues fairly included therein.

INTEREST OF THE INSTITUTE AS *AMICUS CURIAE*

The Institute is the only national accounting association whose membership is limited to certified public accountants; it now has approximately 160,000 members. Among its purposes are the promotion and maintenance of high professional standards of practice. Pursuant to those purposes, the Institute develops Generally Accepted Auditing Standards ("GAAS") which form the standard of professional conduct for independent public accountants in the examination and expression of an opinion on financial statements, and the Institute has come to be accepted as authoritative in the promulgation and interpretation of standards and procedures in its field.

The Institute thus has a significant interest in the scope and bases of civil liability for damages sought to be imposed upon independent public accountants who are required to follow GAAS and other Institute pronouncements in connection with their work.

In recognition of this interest, the Institute presented its views on such matters before the United States Senate in 1934 at the time the Senate was considering the scope of civil liability for damages to be provided in the 1934 Act. See *Hearings on S. Res. 84 (72d Cong.), S. Res. 56 and S. Res. 97 (73d Cong.) Before the Senate Committee on Banking and Currency,* 73d Cong., 1st Sess., pt.15, 7207-10 (1934) ("1934 *Hearings*"). This Court has permitted the Institute to file briefs *amicus curiae* on related issues in *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185 (1976); *Touche Ross & Co.* v. *Redington*, 442 U.S. 560 (1979); and *Aaron* v. *SEC,* 446 U.S. 680 (1980).[3]

The decision of the Court of Appeals is representative of a trend in the lower courts to imply causes of action under

3. The Court also granted the Institute leave to file a brief *amicus curiae* in support of the Petition for a Writ of Certiorari in *A. H. Robins Co., Inc. v. Ross,* 446 U.S. 946 (1980) although the Court denied the Writ of Certiorari therein.

Section 10(b) with considerable liberality. Auditors, because of the significance of their role in the dissemination of financial information to investors, are particularly vulnerable to such implied causes of action. The accounting profession and the Institute thus have an important stake, beyond the concerns of the immediate litigants, in the appropriate doctrinal and practical development of the jurisprudence of the 1934 Act. The Institute submits this brief to express its view that the present case raises issues of far-reaching significance that should be decided by this Court.

SUMMARY OF ARGUMENT

The opinion below is typical of lower court decisions which have interpreted the federal securities laws expansively by implying private rights of action. These decisions abound despite this Court's repeated admonitions that such actions should be implied sparingly. The lower courts have undertaken this expansion by *inter alia* answering questions that have been left open by this Court in a manner which is clearly inconsistent with the Court's rulings.

Two examples of such judicial expansion exist in this case. The Court of Appeals held that a private cause of action for damages may be implied under Section 10(b) of the 1934 Act in favor of a purchaser of securities who is unable to satisfy the criteria for asserting the express cause of action provided by Section 18 of that Act. The Court so held even though the language of Section 18 and its legislative history clearly demonstrate that Congress made a conscious decision to define specifically the extent of a private cause of action under Section 18. The holding is also at odds with this Court's recent pronouncements that the existence of an express cause of action in a statutory framework tends to show that an implied cause of action was not intended by Congress.

The Court of Appeals also decided that a private cause of action may be implied against a party who aids and abets a violation of Section 10(b). The implication of this private remedy by the Court below as well as many other lower courts is apparently premised on a tort law analogy that has been explicitly rejected by this Court. Because there is no evidence in the language or legislative history of Section 10(b) that Congress intended to create a private right of action against aiders and abettors under that section, there is absolutely no foundation for the Court below to do so.

This Court should grant the writ in these cases to decide now certain hitherto open questions and to provide urgently needed guidance to the lower courts as to the existence and scope of implied remedies under the 1934 Act. Litigation asserting such remedies continues to proliferate and the decisions rendered by the courts below reflect substantial confusion which this Court should promptly address.

REASONS FOR GRANTING THE WRIT

A.

THE HOLDING BELOW IS REPRESENTATIVE OF A TREND OF LOWER COURT DECISIONS WHICH DISREGARD THE LIMITATIONS ON IMPLIED CAUSES OF ACTION ANNOUNCED BY THIS COURT.

The Court below decided that an implied private cause of action for damages exists under Section 10(b) of the 1934 Act: (a) in favor of purchasers who were unable to obtain the remedies expressly provided in the 1934 Act; and (b) against professionals who were not sellers of securities but who allegedly aided and abetted others in violation of that Act. The Court of Appeals thus answered two of the questions about the scope of implied civil remedies which were explicitly reserved by this Court in *Ernst & Ernst* v.

Hochfelder, supra at 192 n.7, 211 n.31.[4] In each instance, the Institute contends that the Court of Appeals erred for reasons briefly discussed in parts B and C below.

If there were no more to this case than a discrete incident of error in deciding open questions of federal securities law, the Institute might not urge this Court to grant certiorari to review the matter. But there is more to the case.

The decision below is a paradigm of those cases in which lower courts have increasingly seized upon questions left open by this Court to develop expansionist applications of Section 10(b) of the 1934 Act along lines that are quite plainly at odds with the teachings of this Court's recent decisions. Open questions, of course, are open; but the lower courts seem to be deciding these issues inconsistently with the doctrinal pronouncements of this Court in the area. Examples of this propensity to exploit open issues in aid of the aggressive implication of remedies under the 1934 Act abound; a few will suffice to make the present point.

This Court has twice left open the issue of whether recklessness could, in some circumstances, satisfy the requirement of *scienter* under Section 10(b). *Ernst & Ernst* v. *Hochfelder, supra* at 194 n.12; *Aaron* v. *SEC, supra* at 686 n.5. The lower courts have rushed to fill that vacuum, repeatedly finding that recklessness will suffice to support a claim for damages under Section 10(b).[5]

4. The District Court also addressed a third issue left open by this Court—whether there is a cause of action available under Section 17 of the Securities Act of 1933, 15 U.S.C. § 77q (1976) ("1933 Act"). *Wachovia Bank and Trust Co., N.A. v. National Student Marketing Corp.*, 461 F. Supp. 999, 1004-07 (D.D.C. 1978). *See Aaron* v. *SEC*, 446 U.S. 680, 689 (1980); *International Brotherhood of Teamsters* v. *Daniel*, 439 U.S. 551, 557 n.9 (1979); *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 733 n.6 (1975). The Court of Appeals pretermitted the issue, Appendix to PMM Petition at 18a-19a n.19, while noting that the circuits were in conflict on the point.

5. *E.g., Huddleston* v. *Herman & MacLean*, 640 F.2d 534, 544-47 (5th Cir. 1981); *Healey* v. *Catalyst Recovery of Pa., Inc.*, 616 F.2d 641, 649 (3d Cir. 1980); *Mansbach* v. *Prescott, Ball & Turben*, 598 F.2d 1017,

(footnote continued)

While these cases acknowledge *Hochfelder,* they rely heavily on the familiar invocation of the remedial purposes "underlying the federal securities laws" as justifying their liberal construction. *See, e.g., Mansbach* v. *Prescott, Ball & Turben,* 598 F.2d 1017, 1024-25 (6th Cir. 1979), *citing, Affiliated Ute Citizens* v. *United States,* 406 U.S. 128, 151 (1972). These cases do not pay similar deference to the repeated cautions by this Court that remedial gaps in congressional legislative schemes are not to be filled by judicial interpretation,[6] nor to this Court's explicit recognition that the remedial purposes of the 1934 Act do not provide a license for expansive judicial interpretation of its provisions. *Touche Ross & Co.* v. *Redington, supra* at 578; *SEC* v. *Sloan,* 436 U.S. 103, 116 (1978); *Ernst & Ernst* v. *Hochfelder, supra* at 200. This Court has recently reiterated that this constraint springs from the constitutional limitations upon the federal courts as tribunals of limited jurisdiction and from the constitutional imperative that the courts defer to the Congress for the development of remedial legislative schemes. *E.g., Kissinger* v. *Reporters Committee,* 445 U.S. 136, 149-50 (1980); *California* v. *Sierra Club,* —U.S.—, 49 U.S.L.W. 4441, 4444 (April 28, 1981); *Touche Ross* v. *Redington, supra* at 578-79; *Cf. Milwaukee* v. *Illinois,* —U.S.—, 49 U.S.L.W. 4445, 4447 (April 28, 1981).

The result of this generous interpretation of the *scienter* element of Section 10(b) has been the creation, through a

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(footnote continued)
1023 (6th Cir. 1979); *Nelson* v. *Serwold,* 576 F.2d 1332, 1337 (9th Cir.), *cert. denied,* 439 U.S. 970 (1978); *Rolf* v. *Blyth, Eastman Dillon & Co., Inc.,* 570 F.2d 38, 44 (2d Cir.), *cert. denied,* 439 U.S. 1039 (1978); *Sunstrand Corp.* v. *Sun Chemical Corp.,* 553 F.2d 1033, 1039-40 (7th Cir.), *cert. denied,* 434 U.S. 875 (1977). See, Steinberg and Gruenbaum, *Variations of "Recklessness" After* Hochfelder *and* Aaron, 8 SEC. REG. L. J. 179 (1980).

6. *E.g., California* v. *Sierra Club,* —U.S.—, 49 U.S.L.W. 4441, 4444 (April 28, 1981); *Universities Research Ass'n* v. *Coutu,* —U.S.—, 49 U.S.L.W. 4354, 4358 (April 6, 1981); *Transamerica Mortgage Advisors* v. *Lewis,* 444 U.S. 11, 15-16, 23-24 (1979); *Touche Ross & Co.* v. *Redington,* 442 U.S. 560, 578 (1979). *See also, Cannon* v. *University of Chicago,* 441 U.S. 677, 740-45 (1979) (Powell, J., dissenting).

developing federal common law, of an implied cause of action for behavior well short of "knowing or intentional misconduct." *Compare, Aaron* v. *SEC, supra* at 690; *Ernst & Ernst* v. *Hochfelder, supra* at 197.

These developments in the doctrine of *scienter* have spawned a cognate line of cases having remarkably anomalous consequences. These decisions hold that, whereas before *Hochfelder* a plaintiff could be obligated to prove due diligence in one form or another in order to make out his case,[7] after *Hochfelder,* only recklessness on the part of the plaintiff, demonstrated affirmatively by the defendant, could bar recovery.[8] The logic of these cases appears to be that since his burden of proof as to the defendant's state of mind has been increased, the plaintiff's burden of proof as to his own culpability should be eased. Whatever one may think of this emerging rule as a proposition of logic or of policy, see *Dupuy* v. *Dupuy,* 434 U.S. 911 (1977) (White, J., dissenting from denial of certiorari), its acceptance in the Courts of Appeals has mushroomed since *Hochfelder.* See Comment, *A Reevaluation of the Due Diligence Requirement for Plaintiffs in Private Actions Under SEC Rule 10b-5,* 1978 WIS. L. REV. 904, 911 (1978).

These cases ascribe to *Hochfelder* the remarkable consequence of expanding the implied cause of action available

7. *E.g., Hirsch* v. *du Pont,* 553 F.2d 750, 762-63 (2d Cir. 1977); *Rochez Bros., Inc.* v. *Rhoades,* 491 F.2d 402, 409 (3d Cir. 1974), *cert. denied,* 425 U.S. 993 (1976); *Clement A. Evans & Co.* v. *McAlpine,* 434 F.2d 100, 104 (5th Cir. 1970), *cert. denied,* 402 U.S. 988 (1971); *City Nat'l Bank* v. *Vanderboom,* 422 F.2d 221, 230 (8th Cir.), *cert. denied,* 399 U.S. 905 (1970). See also, Wheeler, *Plaintiff's Duty of Due Diligence Under Rule 10b-5: An Implied Defense to an Implied Remedy,* 70 NW. U. L. REV. 561 (1976); Comment, *A Reevaluation of the Due Diligence Requirement for Plaintiffs in Private Actions Under SEC Rule 10b-5,* 1978 WIS. L. REV. 904 (1978).

8. *E.g., Mallis* v. *Bankers Trust Co.,* 615 F.2d 68, 77-79 (2d Cir. 1980); *Dupuy* v. *Dupuy,* 551 F.2d 1005, 1013-24 (5th Cir.), *cert. denied,* 434 U.S. 911 (1977); *Sunstrand Corp.* v. *Sun Chemical Corp., supra* at 1048-49; *Holdsworth* v. *Strong,* 545 F.2d 687, 692-95 (10th Cir. 1976), *cert. denied,* 430 U.S. 955 (1977); *Straub* v. *Vaisman & Co.,* 540 F.2d 591, 596-98 (3d Cir. 1976). See Comment, *op. cit. supra* 1978 WIS. L. REV. at 911 *et seq.*

under Section 10(b) to previously debarred plaintiffs who were negligent in the protection of their own affairs. This is expansionist common law judgecraft in full flight.

Or, again, consider the implication of a cause of action under Section 17(a) of the 1933 Act, a question which, as we have previously noted, has three times been left open by this Court. See note 4, *supra*. The lower courts virtually uniformly have reached the conclusion that an implied cause of action is available under that section notwithstanding the availability of express causes of action under both the 1933 Act and the 1934 Act. The discussion of the matter by the District Court in this case is not atypical. *Wachovia Bank and Trust Co., N.A.* v. *National Student Marketing Corp., supra* at 1004-07. That Court was following with some fidelity the doctrinal developments in the Courts of Appeals. See, *e.g., Kirshner* v. *United States,* 603 F.2d 234, 241 (2d Cir. 1978), *cert. denied,* 442 U.S. 909 (1979); *Daniel* v. *International Brotherhood of Teamsters,* 561 F.2d 1223, 1245-46 (7th Cir. 1977), *rev'd on other grounds,* 439 U.S. 551 (1979); *Newman* v. *Prior,* 518 F.2d 97, 99 (4th Cir. 1975).

Arguably, much of this derives from the implication of a private cause of action under Section 10(b) of the 1934 Act in the first place. The rationale for the implication of that private cause of action at all has since been thoroughly discredited. *Compare Kardon* v. *National Gypsum Co.,* 69 F. Supp. 512 (E.D. Pa. 1946) *with Touche Ross & Co.* v. *Redington, supra* at 576-78. Quite plainly, if that issue were presented now for the first time, no private cause of action would be implied. *Cf. Cannon* v. *University of Chicago,* 441 U.S. 677, 692-93 n.13 (1979); *Blue Chip Stamps* v. *Manor Drug Stores,* 421 U.S. 723, 729-30 (1975). Although the vast majority of cases recently brought have been at the instance of purchasers, the acquiescence thus far accorded by this Court to the implication of a private cause of action under Section 10(b) has been limited to actions by sellers, to whom no express remedies are afforded by the 1933 or

1934 Acts. *Affiliated Ute Citizens* v. *United States, supra*; *Superintendent of Insurance* v. *Bankers Life and Casualty Co.*, 404 U.S. 6 (1971). In all other respects, this Court has been at pains to prune the "judicial oak" identified in *Blue Chip Stamps* v. *Manor Drug Stores, supra* at 737.

In doing so, this Court has exhibited its customary restraint in not prematurely reaching issues unnecessary for decision. As this discussion indicates, however, the lower courts have typically regarded such reserved questions as comprising an agenda of issues which they were at liberty to address as common law courts bent on nurturing the growth of the 10(b) implied cause of action. Two such fundamental issues are presented here. The Court should accept this case not only to correct the errors of the Court below in deciding these particular issues (to which we next turn), but also to address again the fundamental extravagance which gave rise to those errors in the first place.

B.

IT WAS ERROR TO IMPLY A CAUSE OF ACTION UNDER SECTION 10(b) IN FAVOR OF PURCHASERS WHO WERE UNABLE TO OBTAIN RELIEF UNDER SECTION 18 OF THE 1934 ACT.

This Court has recognized that the existence of an express cause of action in a statutory regime tends to show that an implied cause of action was not intended by Congress to be available. As the Court put it in *Transamerica Mortgage Advisors* v. *Lewis*, 444 U.S. 11, 19 (1979), "... it is an elemental canon of statutory construction that where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it." *Accord, Universities Research Ass'n* v. *Coutu*, —U.S.—, 49 U.S.L.W. 4354, 4359 n.24 (April 6, 1981); *Kissinger* v. *Reporters Committee, supra* at 148-49; *National Railroad Passenger Corp.* v. *National Ass'n of Railroad Passengers*, 414 U.S. 453, 458 (1974).

This injunction is particularly apt where the cause of action sought to be implied is broader than the explicit causes of action provided in terms by the Act. *Touche Ross & Co.* v. *Redington, supra* at 574; *Blue Chip Stamps* v. *Manor Drug Stores, supra* at 736.

The Court below reached precisely the anomalous result against which these decisions warn. Congress provided an express remedy to purchasers for misleading statements in Section 18 of the 1934 Act. That section, among other things, deals particularly with the liability of persons such as accountants, who provide professional assistance in connection with filings with the SEC. The language of Section 18 and its legislative history and relationship to other portions of the 1934 Act plainly suggest that Congress made a conscious policy choice in defining the contours of the private cause of action established by Section 18 as it did. It comprehensively described which purchasers might sue, whom they might sue and for what they might sue; it established the outer bounds of timeliness for such an action, provided for certain defenses and positioned the burden of proof on key issues implicated in the cause of action it was creating.

All this is clear enough from an examination of the statutory language which, as this Court has frequently observed, is the starting point of analysis. *E.g., California* v. *Sierra Club, supra* at 4443; *Santa Fe Industries, Inc.* v. *Green*, 430 U.S. 462, 472 (1977). Moreover, the legislative history of the 1934 Act demonstrates that Congress meant what it said in limiting liability along the lines prescribed in Section 18. While the legislative history of the Act is silent on the existence or ambit of any implied causes of action, *see Aaron* v. *SEC, supra* at 690; *Touche Ross & Co.* v. *Redington, supra* at 571, that history is not similarly silent on the scope of the express causes of action provided by Section 18. Both the Senate Report and the House Report

affirmed that liability and damages with respect to misleading statements contained in filed documents would lie in favor of "a person who in reliance on the statement and in ignorance of its false or misleading character has purchased the security to which it relates at a price affected by it."[9]

The congressional debates also focused on the unavailability of this remedy to a purchaser who did not rely on the allegedly misleading statements. *See, e.g.*, 78 CONG. REC. 7701, 8040 (1934). Similarly, there was direct focus on the policy implications of the statute of limitations and the nature and amount of damages available under the Act. *See, e.g.*, 1934 *Hearings* at 6565, 7208-09; see also, *Blue Chip Stamps* v. *Manor Drug Stores*, *supra* at 736, 740-41. In short, Congress quite deliberately chose to define with care the private civil remedy that would be available to purchasers of securities under the 1934 Act.

Plaintiffs here did not rely on the allegedly misleading statements and did not timely sue under Section 18. They could not, therefore, recover upon the express remedy provided under Section 18.

The Court below found in this circumstance that the express cause of action under Section 18 of the Act was "not available" and did not "adequately dispose of [the plaintiffs'] claim." Appendix to PMM Petition at 33a, 34a. As a result, the Court thought that it could and should imply a cause of action which would be available to the plaintiffs and which would completely dispose of their claim.[10] This was error.

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9. S. REP. No. 792, 73d Cong., 2d Sess. 21 (1934); H.R. REP. No. 1383, 73d Cong., 2d Sess. 25 (1934). *See also*, S. REP. No. 792, *supra* at 13.

10. Brushing aside as irrelevant to the present case this Court's repeatedly "expressed concern about implying private rights of action when express remedies have been created by statute", the Court below analyzed the express causes of action available under Section 18 and under Section 11 of the 1933 Act to demonstrate that the "express reme-

(footnote continued)

The remedy of Section 18 was unavailable to these purchasers and did not dispose of their claim precisely because the Congress so designed the Act as to make a remedy unavailable to purchasers such as respondents with a claim such as they had. This is not a judgment which the courts are at liberty to reverse because they believe the congressional policy was unwise; nor is the hiatus in remedies produced by the design of the 1934 Act one which the courts are at liberty to fill. *Universities Research Ass'n* v. *Coutu, supra* at 4358; *Touche Ross & Co.* v. *Redington, supra* at 578, 579.

Because the Court below, for reasons of policy, divined a gap in the statutory scheme which departed from that Court's view of the remedial purposes of the legislation it was construing, it implied a cause of action in favor of purchasers who did not rely on the allegedly misleading financial statements and who slept on their rights beyond the period of limitations governing the express cause of action provided by the 1934 Act. The Court, in thus implying a cause of action broader than the express remedies available under the Act, overreached its authority and erred as a matter of law.

The writ should be granted to review and reverse this determination.

(footnote continued)

dies are meant to treat different problems and to be applied in different situations." Appendix to PMM Petititon at 27a-28a. That analysis, of course, begs the question as to whether the different problems and different situations to which the express remedies apply were meant by Congress to be the only problems and situations to which private causes of action should apply. If certiorari is granted by the Court in this case, the Institute will again seek leave to submit an *amicus* brief which will, among other things, examine this issue in some detail.

C.

PRIVATE CAUSES OF ACTION FOR AIDING AND ABETTING VIOLATIONS OF SECTION 10(b) OF THE 1934 ACT SHOULD NOT BE IMPLIED.

This Court has never decided whether civil liability could be imposed for aiding and abetting violations of Section 10(b). *Ernst & Ernst* v. *Hochfelder*, *supra* at 191-92 n.7. Preliminary research indicates that since the time this question was left open in *Ernst*, the lower courts have been faced with the issue on literally hundreds of occasions. These cases typically involve charges against professionals who have allegedly contributed to a violation by a principal perpetrator while they were engaged in their callings. Approximately one half of these cases have involved accountants.

This Court's recent decisions which recognized the limits governing the implication of private remedies under the federal securities laws in general have likewise repudiated the theoretical basis usually employed for such actions against aiders and abettors. Notwithstanding these decisions, however, the lower courts have continued to imply private causes of action for aiding and abetting violations of Section 10(b) against parties engaged in customary business activities such as preparing financial statements and giving legal or investment advice. See Ruder, *Multiple Defendants in Securities Law Fraud Cases: Aiding and Abetting, Conspiracy*, In Pari Delicto, *Indemnification and Contribution*, 120 U. PA. L. REV. 597, 632 (1972). These cases impose upon such professionals the great burden of investigating the activities of the party who is being assisted and of forcing them to defend vexatious actions which are often brought solely for their settlement value. This is an abuse to which this Court has adverted: "[E]ven a complaint which by objective standards may have very little chance of success at trial has a settlement value to the plaintiff out

of any proportion to its prospect of success at trial...." *Blue Chip Stamps* v. *Manor Drug Stores, supra* at 740.

Implied rights of action against an alleged aider and abettor of a Section 10(b) violation have conventionally been based—as were such rights under the securities laws generally[11]—upon common law tort principles. For example, in *Brennan* v. *Midwestern United Life Insurance Co.,* 259 F. Supp. 673 (N.D. Ind. 1966), the Court, after noting that nothing in Section 10(b) or its legislative history indicated a congressional intent to create a private remedy, relied upon the Restatement of Torts § 876 (1939), and held that there was a private right of action against an aider and abettor of a Section 10(b) violation. *See also, Landy* v. *FDIC,* 486 F.2d 139 (3d Cir. 1973), *cert. denied,* 416 U.S. 960 (1974).

This Court has now rejected this tort law analogy as a predicate of implied remedies under the federal securities laws. In *Touche Ross & Co.* v. *Redington, supra* at 568, the Court specifically held that: "[I]mplication of a private right of action based on tort principles, therefore, is entirely misplaced." See, Fischel, *Secondary Liability Under Section 10(b) of the Securities Act of 1934,* 69 CAL. L. REV. 80 (1981) ("Fischel"). Since the tort law analogy was the only rationale for implying a private cause of action against an aider and abettor under Section 10(b), *see id.* at 84, *citing Brennan, supra,* this Court's rejection of that rationale has left the judicially created private cause of action for aiding and abetting without any theoretical underpinning. The special history which has thus far led this Court to a limited acquiescence in the implication of a private right of action on behalf of sellers against principal wrongdoers, *Superintendent of Insurance* v. *Bankers Life and Casualty Co., supra* at 13 n.9, does not provide a basis for extending the reach of that cause of action on the basis of a

11. See, *e.g., Kardon* v. *National Gypsum Co., supra* relying, in the absence of discernible congressional intent, upon the Restatement of Torts § 286 (1934).

now rejected analysis. Indeed, the restraint that should govern such an exercise owes something to principles of constitutional magnitude and cannot be lightly set aside. See, *Cannon* v. *University of Chicago, supra* at 742-47 (Powell, J., dissenting).

Instead of relying on common law tort principles to determine whether to imply a private right of action, the Court has emphasized that "the focus of the inquiry is on whether Congress intended to create a remedy." *California* v. *Sierra Club, supra* at 4444; *Universities Research Ass'n* v. *Coutu, supra* at 4358; *Transamerica Mortgage Advisors, Inc.* v. *Lewis, supra* at 15-16; *Cannon* v. *University of Chicago, supra* at 688. Notwithstanding the Court's repeated holdings that congressional intent is the touchstone for determining whether to imply private remedies under the federal securities laws, however, the lower courts have adhered to tort concepts in implying such private causes of action for aiding and abetting.[12] See, *e.g., Edwards & Hanly* v. *Wells Fargo Securities Clearance Corp.,* 602 F.2d 478, 483 and n.5 (2d Cir. 1979), *cert. denied,* 444 U.S. 1045 (1980).

This recourse to the discredited approach is necessitated by the fact that the securities laws contain no language rendering an alleged aider and abettor liable for damages

12. Since this Court's decision in *Touche Ross & Co.* v. *Redington, supra,* in which the implication of private rights of action based on tort principles was specifically rejected thereby eliminating the sole basis for aider and abettor liability, the lower courts have dealt with aider and abettor liability under Section 10(b) in over 100 cases, many of which have involved accountants. In *IIT* v. *Cornfeld,* 619 F.2d 909 (2d Cir. 1980), for example, the Second Circuit listed the elements of a private cause of action for aiding and abetting a violation of the securities laws. The third element is "'substantial assistance' by the aider and abettor in the achievement of the primary violation." *Id.* at 922. This element is taken from the Restatement of Torts § 876 (1939). 3 A. BROMBERG & L. LOWENFELS, SECURITIES FRAUD & COMMODITIES FRAUD § 8.5(530) at 208.20-.21 (1981). The Second Circuit's test, including the "substantial assistance" element, which is based on tort principles, has been widely used. *E.g., Rolf* v. *Blyth, Eastman Dillon & Co., Inc., supra; Woodward* v. *Metro Bank of Dallas,* 522 F.2d 84 (5th Cir. 1975); *SEC* v. *Coffey,* 493 F.2d 1304 (6th Cir. 1974), *cert. denied,* 420 U.S. 908 (1975); *Landy* v. *FDIC,* 486 F.2d 139 (3d Cir. 1973), *cert. denied,* 416 U.S. 960 (1974).

under Section 10(b) and that the legislative history is not consistent with an implication of such liability.

A look at the statutory language and structure confirms this. Whereas Section 15 of the 1933 Act and Section 20(a) of the 1934 Act impose secondary liability on controlling persons, there is no provision in Section 10(b) for liability for aiding and abetting. It is clear that when Congress intended to impose secondary liability, "it had little trouble in doing so expressly." *Blue Chip Stamps* v. *Manor Drug Stores, supra* at 734; Fischel, *supra* at 97. The express provision of remedies against specific secondary participants again invokes this Court's frequent admonition "that where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it." *Transamerica Mortgage Advisors* v. *Lewis, supra* at 19. The existence of secondary liability under Section 15 of the 1933 Act and Section 20(a) of the 1934 Act strongly suggests the limitation of congressional intent on the subject and leads to the conclusion that the courts may not imply a private right of action under Section 10(b) against other persons claimed to be secondarily liable.

The inquiry into congressional intent to create a private cause of action for aiding and abetting a Section 10(b) violation is, of course, a fruitless exercise. It was the silence of the legislative history as to congressional intent that originally led the *Brennan* court, *supra,* to resort to tort principles to imply such an action. There is absolutely no evidence in the legislative history of Section 10(b) that would indicate that Congress intended to hold aiders and abettors civilly liable under the Section.

In subsequent reviews of the 1933 and 1934 Acts, Congress failed to enact proposals pertaining to additional aiding and abetting liability. In 1959, for example, the SEC proposed that an aiding and abetting section be added to both the 1933 and 1934 Acts to establish a statutory basis for the proposition that an aider and abettor may be liable

to administrative sanctions or injunctive relief in proceedings brought by the SEC under those sections not containing an express imputation of such liability. *Hearings on S.1178-S.1182 Before a Subcommittee of the Senate Committee on Banking and Currency,* 86th Cong., 1st Sess. 275-76 (1959). In proposing these amendments, the SEC noted a precise limitation on its recommendation: in seeking to extend the aiding and abetting notion from the criminal law[13] to "civil administrative actions by the SEC", *id.* at 288, the SEC Staff specifically recommended that Congress "[m]ake it clear that no civil liability is intended." *Id.* The episode thus reinforced the plain meaning of the statutory framework: there is no private cause of action against aiders and abettors under Section 10(b).

The lower courts' continued use of implied private causes of action for aiding and abetting violations of Section 10(b) despite this Court's recent pronouncements strictly construing the federal securities laws and despite the Court's rejection of the only rationale underlying such actions, creates a great and inappropriate judicial expansion of such secondary liability. The burden of that expansion falls most heavily on professionals such as lawyers and accountants, as this case and any tally of the lower court decisions reflects. Especially when aggravated by liberal interpretations of *scienter* and lowered burdens of proof as to plaintiffs' due care, this undisciplined elaboration of implied remedies poses for those professionals the hazards of vexatious and unlimited exposure against which this Court has warned. *See Blue Chip Stamps* v. *Manor Drug Stores, supra* at 739. The Court should now explicitly resolve this important open issue.

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13. 18 U.S.C. § 2 (1976).

CONCLUSION

The Writ of Certiorari in these cases should be granted and the judgments of the Court of Appeals reversed.

Respectfully submitted,

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